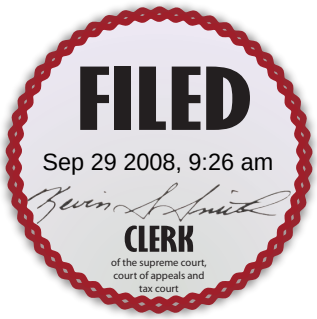

ATTORNEY FOR APPELLANT:

L. ROSS ROWLAND
Public Defender's Office
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

DONALD S. LACY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0802-CR-99
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Wayne J. Lennington, Judge
Cause No.18C05-0702-FC-06

September 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Donald Lacy appeals his conviction and sentence of child molesting, a Class C felony. On appeal, Lacy raises three issues, which we restate as 1) whether alleged judicial prejudice warrants a new trial; 2) whether alleged prosecutorial misconduct warrants a new trial; and 3) whether the trial court properly sentenced Lacy. We affirm, concluding that although Lacy presented evidence of judicial prejudice, such prejudice does not rise to the level of fundamental error so as to warrant a new trial; that Lacy has not established prosecutorial misconduct; and that the trial court properly sentenced Lacy.

Facts and Procedural History

In early October 2006, Lacy's nephew, Steven Turner, and Steven's wife, Katherine Turner, moved into Lacy's home with their three biological children – E.T., V.T., and Z.T. – and their three foster children – B.S., M.A., and J.H. When the Turner family moved in, it was Katherine's understanding that Lacy was preparing to leave on a cross-country bicycle trip and that she and Steven would assume the mortgage payments on his home. According to Katherine, Lacy had initially planned on leaving around two weeks after they moved in, but Lacy continued delaying his trip because he claimed he needed more money. During this time, Lacy helped care for the children by babysitting, preparing meals for them, putting them to bed, and taking them to and from school. This was not new territory for Lacy; he had babysat for some of Steven and Katherine's children many times in the past and also had allowed the Turner children and other children to spend the night at his home. While the Turners lived with him, Lacy

occasionally would sleep with some of the children, claiming that either they climbed into bed with him or he fell asleep while reading them a book. By late November 2006, Katherine "was getting very uncomfortable" with the living arrangement and noticed some of her children "were getting real clingy to me," so she and Steven moved back to their old home in early December 2006. Transcript at 257. On December 20, 2006, E.T. and M.A. told Katherine that Lacy had touched them inappropriately while they were sleeping with him; V.T. made a similar disclosure about a week later. Katherine initially did not report these disclosures to law enforcement because Lacy "was family," telling Lacy instead "to stay away." Id. at 259. However, Katherine later changed her mind after E.T. gave her a handwritten note from Lacy (and addressed to E.T.) that stated, among other things, "I miss you so much" and warning E.T. to "[t]ear up this note and Flush the pieces so Steve doesn't spank you." State's Exhibit 1.

On February 12, 2007, the State charged Lacy with two counts of child molesting as Class C felonies relating to M.A.; one count of child molesting as a Class C felony relating to E.T.; and one count of child molesting as a Class C felony relating to V.T. From October 16 to 18, 2007, the trial court presided over a jury trial, at which Katherine, E.T., M.A., Lacy, and several other witnesses testified. At the close of its case-in-chief, the State dismissed the child molesting count related to V.T. because she was unable to qualify as a witness.[1] The jury was unable to reach verdicts on the child molesting counts relating to M.A., but returned a guilty verdict on the child molesting count relating to E.T. After entering a judgment of conviction on the guilty verdict and conducting a

[1] For the most part, V.T. was non-responsive to initial questioning from the trial court and, when asked if she knew the difference between the truth and a lie, responded, "I don't know." Tr. at 393.

sentencing hearing, the trial court sentenced Lacy to eight years, all executed. Lacy now appeals his conviction and sentence.

Discussion and Decision

I. Judicial Prejudice

Lacy argues the trial court demonstrated prejudice against him, thus depriving him of a fair trial. "A fair trial before an impartial judge is an essential element of due process." Abernathy v. State, 524 N.E.2d 12, 13 (Ind. 1988). To establish that this element was lacking from the defendant's trial, the defendant must show the trial court crossed the barrier of impartiality and prejudiced the defendant's case. Timberlake v. State, 690 N.E.2d 243, 256 (Ind. 1997), cert. denied, 525 U.S. 1073 (1999). In making this determination, a reviewing court begins with the presumption that the trial court is unbiased and unprejudiced, Haynes v. State, 656 N.E.2d 505, 507 (Ind. Ct. App. 1995), and then proceeds to examine the trial court's actions and demeanor to determine whether the presumption has been overcome, see Ruggieri v. State, 804 N.E.2d 859, 863 (Ind. Ct. App. 2004). In examining the trial court's actions and demeanor, a reviewing court recognizes that "the trial judge must be given latitude to run the courtroom and maintain discipline and control of the trial." Id. "Even where the court's remarks display a degree of impatience, if in the context of a particular trial they do not impart an appearance of partiality, they may be permissible to promote an orderly progression of events at trial." Rowe v. State, 539 N.E.2d 474, 476 (Ind. 1989).

Lacy cites three exchanges to support his argument that the trial court was prejudiced against him. The first exchange occurred during the State's cross-examination of Lacy regarding the note he wrote to E.T.:

> Q Referring to State's Exhibit 1. You did write that, correct?
> A Yes.
> Q You did address that to "my beautiful little [E.T.]," correct?
> A Yes.
> Q You just said, when I asked you, that you did not miss her, correct?
> A You asked . . .
> Q Is that correct? It's a yes or no response.
> A Some questions can't be answered yes or no. I'm trying to answer . . .
> [Prosecutor]: Judge, instruct the witness to simply answer my question as I asked them.
> [Trial Court]: We're not having narratives. We're not going to be here forever. I want questions answered. If they can't be answered, they [sic] can say so. But you've go to answer them. You can't just say no, or that isn't right, or whatever. You're not there to argue. You're there to answer the questions.
> [Defense Counsel]: But let me – let me interpose an objection, because the, the, the context of the questions is what's the problem here. Because he could . . .
> [Trial Court]: . . . he could have said, "I can't answer the question," and that would have been the end of it. You should have instructed your client on how to answer questions. He's doing a very poor job of it. I want him to answer directly. I don't want him to argue with [the prosecutor]. I don't want him to argue with you. I'm going to give you a chance to come back and talk to him. Now let's not – let's answer the questions and go on. Sir, if you can't answer the question, you say "I can't answer the question." That's fine.
> [Lacy]: Can I say, "I cannot answer the question as far as . . ."?
> [Trial Court]: No, no, no, you're not going to give excuses or give narratives. That's not part of what we're doing here. You know? We've listened for an hour and a half to [Lacy's] interview with the police officers, all of this going on, and on, and on. Repeat, repeat, repeat. Let's move on, people, please. Answer the question. Sir, if you can't answer, you don't have to answer it. Your attorney will be glad to cover you. Alright?
> [Lacy]: Yes, sir.
> [Trial Court]: You're not – so, you just answer as best you can. Alright?
> [Lacy]: Yes, sir.

Tr. at 487-89.

The second exchange occurred during defense counsel's redirect of Lacy. Prior to that exchange, the State attempted to establish that Lacy considered E.T. his favorite among the Turner children and, to prove that piont, elicited an admission from Lacy on cross-examination that he bought E.T. a bicycle. To rebut the State's charge of favoritism, Lacy's counsel attempted to establish on redirect that Lacy bought bicycles for some of the other Turner children:

> Q You bought [M.A.] a bike, right, when she . . .
> [Prosecutor]: I'm going to object as to relevance. I think we covered it once.
> [Trial Court]: Anything that was . . .
> [Defense Counsel]: Well, it was gone into [sic] on . . .
> [Trial Court]: Go ahead, [defense counsel].
> [Defense Counsel]: He raised – he raised the issue that somehow he treated her with, with, you know, gross favoritism, or whatever. I'm entitled to go into that.
> [Prosecutor]: I never . . .
> [Trial Court]: Are you going to argue that in front of the jury? Are you going to argue that with the jury sitting here? No. Take the jury out.
> . . .
> (Jury leaves the Courtroom)

Id. at 495.

The third exchange occurred during the State's rebuttal to defense counsel's closing argument:

> Two little girls have put their trust in the system. Because we talked about number four is that nobody will do anything about it on child molesting. You are the collective consciousness of the community. You are the community that we all live in here. We all live in Delaware County. I know you work here, you have children here.
> [Defense Counsel]: Well, Judge, when this is done, I've got to interpose an objection, and I think I need to make it now.
> [Trial Court]: What is it?
> [Defense Counsel]: It's improper to, and your instruction is that it's dispassionate it's improper to appeal to the emotions of the jury.

> [Trial Court]: It is not. That's part – I tell you it's your job to try to get them to go to your way of thinking. What you're arguing is not true. And I don't appreciate the interruption. Proceed.

Id. at 528-29.

Before addressing whether these exchanges evidence prejudice against Lacy, we note that Lacy's burden is compounded because his counsel failed to object to the trial court's conduct during these exchanges. As such, Lacy must establish that the trial court's prejudice rises to the level of fundamental error. See Mitchell v. State, 726 N.E.2d 1228, 1235 (Ind. 2000) (explaining that where counsel has failed to make a contemporaneous objection to improper comments by the trial court, the issue is waived and the defendant must establish fundamental error to receive a new trial), overruled on other grounds by Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). The fundamental error doctrine has been described as "extremely narrow," Ruggieri, 804 N.E.2d at 863; it lies only where the error is "so prejudicial to the rights of the defendant as to make a fair trial impossible." Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999); see also Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987) (explaining that for an error to be considered fundamental, it "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process").[2]

[2] Although Lacy apparently concedes he must establish fundamental error to receive a new trial, see appellant's brief at 12 (Lacy stating, in the summary of the argument section of his brief, that "[f]undamental error exists when a trial court argues and criticizes the defendant and defendant's counsel in front of the jury"), we note that in Abernathy, our supreme court recognized that "an attorney may be reluctant to object to the judge's [allegedly inappropriate] actions in the presence of the jury, fearing that an apparent conflict with the judge would cause more damage," and suggested that in Kennedy v. State, 258 Ind. 211, 218, 280 N.E.2d 611, 615 (1972), it treated similar conduct by the trial court "on the merits" notwithstanding a failure to object to some of the trial court's conduct. 524 N.E.2d at 15; see also Hackney v. State, 649 N.E.2d 690, 696 (Ind. Ct. App. 1995) (citing Abernathy and reasoning "[t]he fact that counsel did not object each time the court interjected itself into the proceedings with adverse implications to the defense, should not be viewed as waiver") (Sullivan, J., dissenting),

Lacy argues that the "cumulative effect" of the three exchanges quoted above demonstrates the trial court's prejudice against him. Appellant's Br. at 16. Turning first to the second exchange, the trial court's rhetorical questioning of defense counsel – "Are you going to argue that in front of the jury?", tr. at 495 – is more an expression of dissatisfaction that defense counsel was arguing the reasons for his objection in front of the jury than it was evidence of prejudice. Moreover, even assuming the jury interpreted this comment as evidence of prejudice against Lacy or his counsel, the trial court instructed the jury after their return that the reason it hears such arguments outside the jury's presence is because they "don't have anything to do with guilt or innocence" and admonished the jury not to "hold [such discussions] against either one of the attorneys." Id. at 498. Similarly, regarding the third exchange, although telling defense counsel "I don't appreciate the interruption," id. at 529, is an ill-advised way to overrule an objection, it is not evidence of the trial court's prejudice. Instead, we interpret this statement as the trial court simply displaying "a degree of impatience" with the pace of the proceedings. Rowe, 539 N.E.2d at 476.

Although we disagree with Lacy that the second and third exchanges are evidence of the trial court's prejudice, the trial court's statement during the first exchange that Lacy was "doing a very poor job" of answering questions is a different story. Id. at 488. This statement constitutes evidence of judicial prejudice because the jury reasonably

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trans. denied. The obvious difference between this case and Abernathy and Kennedy is that in both of those cases defense counsel objected to at least part of the alleged improper conduct. See 524 N.E.2d at 15 (noting the defendant "made appropriate objections outside the jury's presence to preserve his allegation of error"); 258 Ind. at 216, 208 N.E.2d at 614 (quoting defense counsel's objection). Moreover, our supreme court's more recent decision in Mitchell makes clear that trial counsel must make a contemporaneous objection to avoid waiver (and the corresponding burden of proving fundamental error) where the alleged error concerns improper conduct by the trial court. See 726 N.E.2d at 1235-36.

could have interpreted it as suggesting that the trial court thought Lacy was answering questions evasively and that the trial court doubted Lacy's credibility. Nevertheless, we are not convinced this single statement rises to the level of fundamental error. Indeed, our research has not revealed any case that has found fundamental error based on a single instance of judicial prejudice. See, e.g., Stellwag v. State, 854 N.E.2d 64, 66-69 (Ind. Ct. App. 2006) (concluding the "cumulative effect of the trial judge's comments crossed the barrier of impartiality" and constituted fundamental error based on evidence that the trial court argued excessively with a defense witness, told the defendant he would be prohibited from testifying if he did not answer the prosecutor's questions, and threatened the defendant with jail if he continued making inappropriate gestures during testimony);[3] Decker v. State, 515 N.E.2d 1129, 1132-34 (Ind. Ct. App. 1987) (concluding the trial court's extensive questioning of witness, who recanted prior testimony that incriminated the defendant, rose to the level of fundamental error because the trial court interrupted the witness when he attempted to explain his reasons for recanting and suggested through its questions that the witness had committed perjury). We recognize that Lacy's guilt turned largely on whether the jury believed the victims' testimony over his, but we cannot say this single, isolated statement was "so prejudicial to the rights of the defendant as to make a fair trial impossible." Willey, 712 N.E.2d at 444-45. Thus, it follows that although Lacy has presented evidence of the trial court's prejudice against him, it does not constitute fundamental error so as to warrant a new trial.

[3] Stellwag involved the same presiding judge as this case.

II. Prosecutorial Misconduct

Lacy argues prosecutorial misconduct warrants a new trial. Determining whether prosecutorial misconduct warrants a new trial requires a reviewing court to conduct a two-step inquiry. See Maldonado v. State, 265 Ind. 492, 498, 355 N.E.2d 843, 848 (1976). First, we must determine whether the prosecutor committed misconduct. Id. This determination is made by referring to case law and the Indiana Rules of Professional Conduct. Id. Second, if the prosecutor did commit misconduct, we must address whether the misconduct placed the defendant in a position of grave peril. Id. This determination turns on the probable persuasive effect of the misconduct on the jury's decision, as opposed to the degree of impropriety. Id. at 499, 355 N.E.2d at 848.

Lacy argues that the following passage by the prosecutor (also quoted above, see supra Part I), which was made during the State's rebuttal to defense counsel's closing argument, constitutes misconduct:

> Two little girls have put their trust in the system. Because we talked about number four is that nobody will do anything about it on child molesting. You are the collective consciousness of the community. You are the community that we all live in here. We all live in Delaware County. I know you work here, you have children here.

Tr. at 528-29. Lacy argues this passage is evidence of prosecutorial misconduct because it was designed to inflame the prejudices of the jury. Although we agree with Lacy that a prosecutor commits misconduct by conducting closing argument in such a manner, see Limp v. State, 431 N.E.2d 784, 788 (Ind. 1982), Lacy has not explained how this passage is evidence of an attempt to inflame the jury. In this respect, we note that the passage indicates the prosecutor was attempting to make two points. The first point – the

prosecutor's appeal to the jury "as the collective consciousness of the community," tr. at 528 – does not constitute misconduct. See Hand v. State, 863 N.E.2d 386, 395-96 (concluding prosecutor did not commit misconduct when it told the jury it was the "moral conscience of the community and must take into account all of the facts and circumstances in this case"); cf. Wilson v. State, 697 N.E.2d 466, 477-78 (Ind. 1998) (concluding that trial court did not erroneously instruct the jury that it was "the moral conscience of our society and must take into account all of the facts and circumstances in this case in order to determine the Defendant's guilt or innocence"). The second point – the prosecutor's reference to "number four," tr. at 528 – goes back to an earlier point the prosecutor was arguing at the outset of his closing argument. Specifically, the prosecutor noted that child molesters in general, and Lacy in particular, get away with their crimes because no one believes the victims. The prosecutor then went on to argue that Lacy "is counting on nobody believing [E.T.] and [M.A.]. Prove him wrong." Id. at 516. Although we recognize that the prosecutor's argument may have constituted misconduct if it was based simply on a general assertion that child molesters get away with their crimes because no one believes their victims, our review of the record indicates that the prosecutor made this argument after explaining why the evidence supported inferences that the testimony of E.T. and M.A. was credible and why Lacy's testimony was not. For example, the prosecutor invited the jury to consider Lacy's demeanor and answers to questions during a police interview, noting that he was "deflect[ing]" attention from himself. Id. at 513. This court has consistently recognized that, during closing argument, a prosecutor may comment on the evidence and the inferences drawn from that evidence,

see Donnegan v. State, 809 N.E.2d 966, 974 (Ind. Ct. App. 2004), trans. denied; Newsome v. State, 686 N.E.2d 868, 876 (Ind. Ct. App. 1997), and we cannot say that the prosecutor's conduct departed from this well-established rule. Thus, because Lacy has not established the prosecutor committed misconduct, it follows that he is not entitled to a new trial on such grounds.

III. Propriety of Sentence

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). A trial court is still required, however, to issue a sentencing statement when sentencing a defendant for a felony. Ind. Code § 35-38-1-1.3; Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Anglemyer, 868 N.E.2d at 490. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

Although it is difficult to discern Lacy's argument, he appears to argue that the trial court abused its discretion because it "did not provide any type of sentencing statement" and because "there was no evaluation of his lack of criminal history." Appellant's Br. at 19. Both of these arguments are without merit. First, although the trial court's sentencing order does not discuss aggravating and mitigating circumstances, the trial court's oral statements during the sentencing hearing provide a detailed assessment of the reasons it imposed an eight-year sentence, see tr. at 578-82, and we are permitted to consider such oral statements in determining whether the trial court abused its discretion, see McElroy v. State, 865 N.E.2d 584, 589 (Ind. 2007). Second, Lacy's argument that "there was no evaluation of his lack of criminal history," appellant's br. at 19, misstates the record; the trial court stated during the sentencing hearing that if found that Lacy's lack of criminal history was a mitigating circumstance, see tr. at 580 ("The mitigating circumstances here, doesn't have a history, hasn't been in trouble."). Thus, we conclude the trial court did not abuse its discretion when it sentenced Lacy.

Conclusion

We conclude that although Lacy presented evidence of judicial prejudice, such prejudice does not rise to the level of fundamental error so as to warrant a new trial. We also conclude that Lacy has not established prosecutorial misconduct and that the trial court properly sentenced Lacy.

Affirmed.

NAJAM, J., and MAY, J., concur.